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No. 84-790

In the Supreme Court of the United States

OCTOBER TERM, 1984

GENERAL PUBLIC UTILITIES CORPORATION, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether a suit against the United States brought by the owners and operator of a nuclear power plant, alleging that the Nuclear Regulatory Commission negligently failed to provide them with sufficient information concerning a safety-related incident at another privately owned and operated nuclear installation, is barred by the discretionary function exception to the Federal Tort Claims Act (28 U.S.C. 2680(a)).

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-17a) is reported at 745 F.2d 239. The memorandum opinion of the district court (Pet. App. 18a-35a) is reported at 551 F. Supp. 521.

JURISDICTION

The judgment of the court of appeals (Pet. App. 36a) was entered on September 28, 1984. The petition for a writ of certiorari was filed on November 15, 1984. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Petitioners, the owners and operator of the Three Mile Island Unit No. 2 nuclear generating plant (TMI), brought this action against the United States under the Federal Tort

Claims Act (28 U.S.C. 2671 *et seq.*), seeking more than $4 billion in damages resulting from the March 28, 1979 accident at TMI. The United States moved to dismiss the complaint on the ground, inter alia, that the suit is barred by the discretionary function exception to the Act's waiver of sovereign immunity (28 U.S.C. 2680(a)). The United States District Court for the Eastern District of Pennsylvania denied the motion (Pet. App. 18a-35a) and certified the question for interlocutory appeal pursuant to 28 U.S.C. 1292(b). The court of appeals reversed (Pet. App. 1a-17a).

1. The accident at TMI occurred when a valve failed to close properly, resulting in a significant loss of water and steam in the reactor's coolant system. Because a faulty instrument showed that the valve was closed and control-room personnel did not perceive the loss of coolant, the operators reduced the flow of replacement water, causing the nuclear core to overheat and radioactive material to be released. Pet. App. 3a, 18a-20a. Petitioners seek damages primarily for loss of plant property and economic losses occasioned by the interruption of power generation at the plant (C.A. App. 111-113).

Petitioners allege that the accident was caused by the failure of the Nuclear Regulatory Commission to report to them as an "abnormal occurrence" or a "generic problem" a similar valve failure that occurred at the Davis-Besse nuclear power plant in 1977 (Pet. App. 11a). An abnormal occurrence is defined as "an unscheduled incident or event which the Commission determines is significant from the standpoint of public health or safety" (42 U.S.C. 5848). Section 5848 specifies that abnormal occurrences be reported to Congress and that the Commission "provide as wide dissemination to the public of the information * * * as reasonably possible." The term "generic problem" is not used in the Act. The Commission's regulations state that its "Office of Inspection and Enforcement develops policies

and administers programs for * * * notifying licensees regarding generic problems so as to achieve appropriate precautionary or corrective action." 10 C.F.R. 1.64.

It is undisputed that the Commission sent to petitioners a Licensee Event Report describing the Davis-Besse incident (Pet. App. 5a & n.3). Petitioners' claim is based on their allegation that the Commission should have characterized that incident as an abnormal occurrence or generic problem and therefore reported more detailed information and an evaluation of what had occurred. *Id.* at 11a; see C.A. App. 90-91 (allegation in petitioners' complaint that Commission violated 42 U.S.C. 5848).[1] Had they received this information, petitioners contend, they would have corrected the valve condition and control-room procedures at TMI and thus prevented the March 1979 accident (Pet. 7; Pet. App. 40a).

2. While the appeal was pending, this Court decided *United States* v. *S.A. Empresa De Viacao Aerea Rio Grandense (Varig Airlines),* No. 82-1349 (June 19, 1984). In *Varig Airlines,* the Court held that claims alleging that plane crashes were caused by the Federal Aviation Administration's negligent performance of its aircraft inspection and certification functions were barred by the discretionary function exception. Relying on *Varig Airlines* and *Dalehite* v. *United States,* 346 U.S. 15 (1953), the court of appeals rejected petitioners' contention that their claim is not within the discretionary function exception (Pet. App. 11a-14a).

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[1]Petitioners do not seek review of the court of appeals' ruling that their claim alleging that the NRC failed to exercise due care in licensing the TMI facility is within the discretionary function exception (Pet. 5-6 n.4; see Pet. App. 14a-16a). Nor, apparently, do they challenge the court of appeals' similar disposition of their claim that the Commission failed to conduct an adequate investigation of the Davis-Besse incident (see *id.* at 8a, 10a-11a).

The court of appeals reasoned that the determination of whether an "abnormal occurrence" had occurred is "entrusted to the discretion of the Commission" (Pet. App. 12a). As the court noted, such a determination "is not a mere ministerial task" but rather requires "[t]echnical and scientific evaluations" and "considerations of public health and safety" (*id.* at 12a-13a). The classification of this decision as a discretionary function, the court reasoned, followed directly from *Varig Airlines* and *Dalehite* (Pet. App. 13a):

> There is no substantial distinction between the choice made by the FAA as to its method of inspection and decisions made by the Nuclear Regulatory Commission to classify certain incidents as statutory "abnormal occurrences." If anything, the discretion entrusted to the Commission would seem to be greater than that given the FAA.
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> * * * * *
>
> [T]he government's specifications of bag labels and bills of lading in *Dalehite, see* [346 U.S.] at 39, implicate far less of a policy determination than the classification of a nuclear event as an abnormal occurrence.

A similar analysis applied to the determination of whether an incident represents a "generic problem" (Pet. App. 14a). The court concluded that, like reports of abnormal occurrences, "[t]he program for notifying licensees of generic problems is but one part of the overall discretionary function the Commission undertakes when it monitors the safety of the nuclear industry" (*ibid.*).

ARGUMENT

The court of appeals correctly applied this Court's precedents interpreting the discretionary function exception to the facts of this case. "[D]iscretionary acts of the Government acting in its role as a regulator of the conduct of

private individuals" are at the core of the exception (*Varig Airlines,* slip op. 15 (footnote omitted)). The Nuclear Regulatory Commission, in deciding the proper classification of an event at a nuclear generating plant, is plainly making a discretionary determination in the course of its regulatory function.

Petitioners argue primarily (Pet. 8-13) that the Commission's decision not to classify the Davis-Besse incident as an abnormal occurrence or generic problem implicated "[n]o social, economic or political judgments" (Pet. 11) and so does not come within the discretionary function exception.[2] The court of appeals, however, correctly determined that the Commission's decision was not "ministerial" but rather required "[t]echnical and scientific evaluations" and "considerations of public health and safety" (Pet. App. 12a-13a).

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[2]Contrary to petitioners' apparent contention (Pet. 7-8), failure-to-warn cases are not excluded from the coverage of the discretionary function exception. There is of course no basis in the statutory language for such an exclusion. Where discretion is involved in determining whether any warning is called for or the type of warning to be made, the discretionary function exception applies. See, *e.g., Dalehite* v. *United States,* 346 U.S. at 41-42 (decisions with respect to contents of labelling of potentially explosive fertilizer are within the exception). Indeed, in *Varig Airlines,* the FAA, by certifying the defective aircraft, had failed to warn of their dangerous condition.

Petitioners also are incorrect in arguing (*e.g.,* Pet. 12) that *Varig Airlines* is inapplicable because here the agency failed to provide information known to it while in *Varig Airlines* the defects were never discovered. Petitioners simply miss the discretionary function at issue in this case: determining whether the Davis-Besse incident constituted an "abnormal occurrence" or "generic problem," which would have resulted in a more complete report by the Commission than the warning it actually gave. In effect, petitioners would have the courts second-guess Congress's and the Commission's decision to require reports only of serious events and not of every last datum in the agency's files. The discretionary function exception is designed precisely to prevent such judicial intervention (*Varig Airlines,* slip op. 16, 22). Moreover, the exception applies "whether or not the discretion involved be abused" (28 U.S.C. 2680(a)). Accordingly, whether the Commission was negligent or otherwise acted wrongfully is irrelevant. See *Dalehite* v. *United States,* 346 U.S. at 33.

The statute requiring reports of abnormal occurrences conclusively demonstrates that the determination of whether such an event has occurred is entrusted to the discretion of the Commission: "an abnormal occurrence is an unscheduled incident or event *which the Commission determines is significant from the standpoint of public health or safety.*" 42 U.S.C. 5848 (emphasis added); see 42 Fed. Reg. 10950 (1977) (guidelines for classification of incident as an abnormal occurrence). It is frivolous to suggest that such a determination (or the similar inquiry with respect to the existence of a "generic problem") does not implicate the agency's discretion or that Congress intended to subject the Commission's determination to judicial review in the guise of adjudicating tort claims.[3]

Nor is there merit to petitioners' argument (Pet. 13-15) that the Commission, in monitoring the safety of nuclear power plants, is not acting in its regulatory capacity.[4] The

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[3]The Court made it plain in *Varig Airlines* that *all* discretionary activities, not just those of high-level policy-making officials, are within the exception. See slip op. 15 ("the basic inquiry concerning the application of the discretionary function exception is whether the challenged acts of a Government employee — whatever his or her rank — are of the nature and quality that Congress intended to shield from tort liability"); *id.* at 22 (implementation of inspection program by FAA employees within exception). See also *Flammia* v. *United States*, 739 F.2d 202, 204 (5th Cir. 1984) (under *Varig Airlines*, the exception "extends to specific individual applications as well as to broad policies"). The Court has already vacated and remanded for reconsideration in light of *Varig Airlines* a decision refusing to apply the exception to "conduct consist-[ing] of merely implementing and enforcing mandatory regulations." *Hylin* v. *United States*, 715 F.2d 1206, 1213 (7th Cir. 1983), vacated, No. 83-1818 (Oct. 1, 1984).

[4]The Commission regulates entities, such as petitioners, that own and operate nuclear generating facilities. See 42 U.S.C. 2011 *et seq.*, 5801 *et seq.* (The Energy Reorganization Act of 1974 abolished the Atomic Energy Commission and transferred "all [of its] licensing and related regulatory functions" to the NRC. 42 U.S.C. 5841(f); see 42 U.S.C. 5814(a).) The Commission is given the responsibility for "[r]eview[ing]

Commission does not itself generate nuclear power. Compare *McMichael* v. *United States,* No. 83-2497 (8th Cir. Jan. 2, 1985), slip op. 7 (distinguishing between regulatory and proprietary conduct for purposes of discretionary function exception).[5] In monitoring nuclear facilities and reporting safety-related information, the Commission is not performing a service for the benefit of the owners and operators of nuclear plants but rather is carrying out its regulatory mission — controlling private conduct involving "the possession, use, and production of atomic energy * * * so directed as to make the maximum contribution to * * *

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the safety and safeguards of all [commercial nuclear] facilities, materials, and activities" (42 U.S.C. 5843(b)(2)). It is unlawful to operate a commercial nuclear power plant without a license from the Commission (42 U.S.C. 2131). The Commission is authorized to require from owners and operators "such reports, and the keeping of such records * * * as may be necessary to effectuate the purposes of" the Act (42 U.S.C. 2201(*o*)). Licensees (and others) must immediately report to the Commission any failure to comply with statutory and regulatory requirements and any "defect which could create a substantial safety hazard" as defined by the Commission (42 U.S.C. 5846(a)(2)). The statute authorizes the Commission "to conduct such reasonable inspections and other enforcement activities as needed to insure compliance with" the reporting obligation (42 U.S.C. 5846(d)).

[5]This case is therefore unlike the malfunction of the lighthouse in *Indian Towing Co.* v. *United States,* 350 U.S. 61 (1955), and the erroneous air-traffic information given in the cases relied on by petitioners (Pet. 7), because there the United States had assumed direct, operational responsibility for the activity that caused the injury. See *Zabala Clemente* v. *United States,* 567 F.2d 1140, 1147-1148 (1st Cir. 1977), cert. denied, 435 U.S. 1006 (1978). Moreover, as the Court explained in *Varig Airlines* (slip op. 14), "the discretionary function exception was not implicated in *Indian Towing*" because the government had conceded the point. The only post-*Varig* case relied on by petitioners, *Andrulonis* v. *United States,* 593 F. Supp. 1336 (N.D.N.Y. 1984), is an interlocutory ruling involving the development of a method for immunizing wildlife against rabies. The court distinguished the decision below on the ground that it involved the exercise of regulatory authority (593 F. Supp. at 1338).

the national welfare" (42 U.S.C. 2013(c)).[6] The Commission's monitoring and reporting functions are an important part of its regulation of the conduct of licensees and enforcement of its rules. See, *e.g.*, 10 C.F.R. 1.64 (notification of generic problems is for purpose of "achiev[ing] appropriate precautionary or corrective action"). The responsibility for the safe generation of nuclear power remains squarely on the shoulders of the owners and operators of the power plants, not on the regulatory agency. Cf. *Varig Airlines,* slip op. 22 ("[t]he FAA has a statutory duty to *promote* safety in air transportation, not to insure it") (emphasis in original).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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[6]Accordingly, the fact that petitioners have established for their own benefit a private "warning system * * * to provide the owners and operators of nuclear plants with warnings of serious safety hazards" (Pet. 14) is wholly irrelevant to whether the Commission's safety-related functions are part of its regulatory activities. Petitioners would stand the regulatory scheme on its head: the Commission was created to control its licensees, not to serve them. If the NRC acted improperly, it breached its governmental responsibilities to the general public, not a duty of care to petitioners. The remedy is through administrative or legislative action, not through judicial review in the context of tort litigation brought by private plaintiffs.